



POLICE DEPARTMENT

November 27, 2007

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Milton Bowe
Tax Registry No. 913609
Midtown South Precinct
Disciplinary Case No. 83073/07

The above-named member of the Department appeared before me on September 12, 2007, charged with the following:

1. Sergeant Milton Bowe, while assigned to the Midtown South Precinct on January 15, 2006 at approximately 2215 hours in the vicinity of 5th Avenue and West 39th Street in New York County, did wrongfully and without just cause use force as a member of the New York City Police Department, to wit: said Sergeant did spray a person known to this Department with pepper spray without sufficient legal authority.

P.G. 203-11 Page 1, Paragraph 2 – PROHIBITED CONDUCT

The Department was represented by Katie O'Connor, Esq., Department Advocate's office, and the Respondent was represented by Bruno V. Gioffre, Jr., Esq.

The Respondent, through his counsel, entered a plea of Not Guilty.

A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

EVIDENCEThe Department's Case

The Department called Desiree Faltine as its witness.

Desiree Faltine

Faltine testified that she was a Correction Officer for the New York City Department of Correction with approximately 19 ½ years experience, and had worked at Manhattan Central Booking since 1996. She had never seen the Respondent at Central Booking. [REDACTED]

Faltine testified that on January 15, 2006, she was at an after-hours dance club in Manhattan on 39th Street between Fifth Avenue and Avenue of the Americas with three friends, [REDACTED]. They arrived at the club between 7:00 and 8:00 o'clock in the morning. They left around 2:00 or 3:00 o'clock that afternoon, got something to eat, and went to a movie. Faltine was driving with her three friends in her [REDACTED] vehicle. She denied drinking any alcoholic beverages that day. Her three friends did not work for the Correction Department. The group originally arrived at the club in separate cars.

Faltine testified that her group returned to 39th Street around 10:00 p.m. because [REDACTED]'s car was still parked there, along with all of their property. Faltine was going to drop off her friends and return to work. Faltine was driving down Fifth Avenue, and attempted to make a right turn onto 39th Street, but the street was barricaded. She testified that she was not really blocking the intersection or traffic on Fifth Avenue, since it was a very wide street, and her car was essentially in the parking lane between the two

crosswalks. Faltine testified that she was wearing her seat belt. She also testified that the lighting at the corner was very bright.

Faltine testified that she held her Correction Department shield and identification out of the window, and asked a person she believed to be a security guard for the club that was standing at the barricade "to give me professional courtesy, to let me on the block to get the property." The security guard told Faltine that he could not allow her to pass, and that she would have to speak to a police officer. She did not "assume" at this point that it was the police who had barricaded the block.

Faltine stated that she saw some police officers a couple of feet down the block, and tried getting their attention by blowing her horn. Then, Faltine observed, a "squad car" pulled up behind her. She again held her shield and ID, which were contained in a wallet, out of the window so that they faced toward the back of the car. She only used her left hand to display the items.

Faltine asserted that the Respondent then approached her driver side window and asked, in a "demanding" and "forceful" way, "Officer, is that the way you identify yourself?" Her window was rolled all the way down. Faltine testified that she explained that she was a correction officer, and asked if it were possible for the Respondent to give her "professional courtesy" to gain access to the block because her group had left property in a car parked there. It was very cold out and her group were wearing very light jackets. Faltine stated that the Respondent repeated himself, and she reiterated her request.

Faltine contended that the Respondent then asked, "Do you know who I am?" Faltine responded that she did, recognizing from the Respondent's stripes and gold shield that he was a Sergeant. The Respondent asked for her ID card, and Faltine answered that

she would “show” it to him and “give” him her driver’s license. Again, Faltine testified, the Respondent asked for her ID card, and she answered in the same manner. The Respondent was “[v]ery demanding, like I was supposed to hand it over.” Faltine contended that she was very friendly in tone toward the Respondent, and was in a good mood having just come back from the movie and having a good time with her friends. Her friends were talking amongst themselves, laughing and giggling. She was “probably more calm” at the time than during her testimony, and did not use any profanity. Her friends “were trying to figure out what was the big deal in trying to get my ID card.” The Respondent did not ask where Faltine was assigned.

Faltine testified that she was reluctant to give the Respondent her Correction shield and ID for two reasons. First, she stated that there was often animosity between the Police and Correction Departments, and sometimes, such as during car stops or in bars, “they discard your ID card.” Faltine claimed that she was trained not to hand over her ID. Faltine understood that she was obligated, when off duty and in New York City, to abide by the directives of a New York City police officer, “but not when it comes to my ID card.” Second, the Respondent did not explain why he wanted her to hand those items over; if she had only committed a traffic offense, Faltine believed, he would simply need her driver’s license.

Faltine claimed that as she turned around to get her driver’s license, the Respondent pepper-sprayed her. She contended that the Respondent did not warn her that he was going to pepper-spray her, but she did hear him ask someone for pepper spray. He used “one spray” of the device. After the Respondent pepper-sprayed Faltine, her eyes were burning profusely and she tried to “clear” them. The Respondent tried to get Faltine out of the car, but her seat belt was on, so he grabbed one of her hands and

placed the handcuffs on it. The Respondent's partner came over because the Respondent could not get Faltine out due to the seat belt; the partner, Faltine "guess[ed]," was needed to hold her arm down to get her out of the seat belt. Once Faltine's seat belt was removed, she testified, the Respondent pulled her out of the car and threw her onto the ground. In the course of removing Faltine, her sneaker fell off and her head hit the doorjamb. Faltine asserted that the Respondent then picked her up and threw her against the car. Faltine recalled that her friend Ruthie said, "'that wasn't necessary'" after the Respondent used the pepper spray. The Respondent handcuffed Faltine and told her she was under arrest.

During the time she interacted with the Respondent at the car window, Faltine testified, she did not remove her seat belt, make any motions out of the car, "raise [her] tone," or physically resist the Respondent's request for her ID. The Respondent did not tell her she would be arrested if she did not show him the ID. The whole exchange lasted about four minutes.

Faltine testified that she was placed in the patrol car, but the windows were up and she couldn't breathe. The car door was not locked, so she "kind of turned [her] body" and opened it and asked the Respondent's partner to roll down the windows, which he did. Faltine was taken to the Midtown South Precinct, and although she asked for her sneaker to get out of the car, the officers only returned it once they were inside the precinct. The Respondent told Faltine she would receive the sneaker only after she was searched. Emergency Medical Services flushed Faltine's eyes with water, and she was taken to, she believed, [REDACTED] upon her request.¹ Faltine contended that when

¹ The Department was unable to obtain from the CCRB Faltine's medical records regarding her treatment at [REDACTED] Hospital.

she was walking to the bathroom to have her eyes washed, the Respondent asked her where she worked, and when she said Manhattan Central Booking, he responded, "No, you don't work there anymore." Faltine stated that she just shook her head and kept walking. At the precinct, the Respondent gave Faltine his shield number and stated that his name was Sergeant Bowe.

Faltine claimed that the hospital treated her eyes, but refused to treat her head. After being taken to another precinct to be photographed, Faltine was taken to Manhattan Central Booking. She testified that she told the transporting officers that she was supposed to be taken through the front entrance, because she worked there and "all the prisoners that come there would know that I am an officer, because they come there frequently . . . as opposed to being brought in through the front where they don't see you." Instead, after the officers called their command and refused to take her through the front, Faltine was taken through the back entrance directly to the courtroom. She was charged with disorderly conduct, resisting arrest, and "administrative government code," but was acquitted after trial in, she believed, July 2007. The Department of Correction also brought disciplinary charges against her, resulting in the loss of her gun. She was told that the charges had been dropped.

Faltine asserted that as a result of this incident, she sustained [REDACTED], [REDACTED], a [REDACTED] and [REDACTED], which included [REDACTED]. She did not recall precisely when she sought medical treatment (see Respondent's Exhibit A, Faltine's medical records, Orange Regional Medical Center). She was currently seeing a [REDACTED] for her [REDACTED] [REDACTED].

Faltine brought a civil action against New York City regarding the incident “[b]ecause I thought [the Respondent’s] actions were unjust, and I figured if he would do it to me knowing that I was an officer, what would he do to somebody else that wasn’t an officer?” She did not know the status of the lawsuit, but had hired an attorney, who had asked for \$500,000 in damages.

Faltine related that she had twice previously sought professional courtesy and never had a problem. On the first occasion, she had made a left turn without seeing a no-left-turn sign; when she was pulled over and showed the police officer the case containing her shield and ID, he said “okay; no problem. Don’t worry about it. Just go ahead.” That officer did not ask her to take the ID out, and had he done so and asked her to hand it over, she would have refused. She did not recall the second occasion, which was a long time ago. Generally, Faltine stated, when she gets pulled over while driving, she reaches for her driver’s license, but “they usually see the shield and ID because my license is right behind it,” in one wallet. She also kept two ATM cards and her medical benefits card in the same wallet. Faltine denied that she was “seeking a benefit of a police officer letting [her] go without writing a summons, but whereas someone else who had just a driver’s license, which you could have only shown him, would have gotten a summons.”

Faltine believed that her request to the Respondent for professional courtesy was appropriate, notwithstanding the fact that the street had been blocked off, since “[i]t wasn’t like a fire was on the block or a fight on the block.” She claimed that the Respondent never actually rejected her request for professional courtesy; he just “never gave an answer.” Faltine denied being upset by this. Faltine was not aware of any

Correction Department rule or regulation that she was not supposed to display her shield outside department confines.

Faltine testified that she dealt with high-stress situations as a correction officer. She “tr[ie]d to keep the situation really relaxed, because . . . you can’t seem to annoy the prisoner, because then that makes them more pissed off, and you will end up in an altercation, which you try and keep calm.”

Faltine described her work relations with members of the New York City Police Department as “[v]ery friendly.” However, Faltine testified that occasionally police officers “come in with an arrogant attitude. . . .” She did not find most police officers to be arrogant. She denied having difficulty in the past with police officers, but did have “professional difficulty” now. Faltine stated this did not impact her ability to work with these officers, and that she keeps her feelings about police officers to herself at work. She did not feel personal animosity toward the NYPD, and was in fact dating a police officer at the time of the incident. Faltine noted, however, that “PD always gets pissed off at Corrections because they always say we make more money and things of that nature.”

Faltine admitted that people sometimes “impersonate other individuals with identifications” or “phony IDs.” She did not think, during the encounter, that the Respondent might have been trying to verify her identity. She admitted that the Respondent was acting in his official police capacity.

Faltine admitted that she heard the Respondent asking someone for pepper spray. She admitted that she told the Respondent she had asthma, even though she did not; she did suffer from [REDACTED]. She told the Civilian Complaint Review Board that “that was if I was going to get pepper sprayed so we [*sic*] could tell someone not to spray you.”

Faltine said this to the Respondent because in the Correction Department, "once you say you have asthma, it is a sign for them not to pepper spray you." He [REDACTED] was a problem on cold days.

The Respondent's Case

The Respondent called Police Officer Joseph Pritchard as a witness, and he testified in his own behalf.

Police Officer Joseph Pritchard

Pritchard, a three-year member of the Department, is assigned at the Midtown South Precinct. On January 15, 2006, he was the Operator for the Respondent, Sergeant Bowe. His responsibilities were to drive the Respondent as he supervised other members of the service.

Pritchard recalled that on the night of January 15, 2006, they were driving south on Fifth Avenue on their way to drop off Police Officer Mischo to work a detail at Club Speed, a "big club night" where "they block off the street." As they approached, they saw a car, possibly a small, dark-colored or silver [REDACTED], parked and blocking the right lane of Fifth Avenue. Pritchard testified that the Respondent sounded the siren a few times "just to move the car along." The car did not move, and the Respondent hit the siren again. Pritchard then observed what appeared to be a police shield out of the window, and informed the Respondent of this. The Respondent exited the RMP, but told Pritchard to remain, and that he "will be two seconds." The Respondent went to the driver side window, and Mischo exited the RMP as well and went to the passenger side

of the vehicle. Pritchard observed that there was more than one person inside the Honda; there were at least one male and one female, and possibly a second female.

As Pritchard was sitting in the car for thirty to sixty seconds, Mischo nodded at Pritchard. Mischo "had looked at him and said 'Get out of the car,' so as to indicate 'I may want to get out of the car now' and that 'it was escalating more than just move your car.'" Pritchard commented, however, "At that point I didn't know what to expect." The Respondent had not put over a radio call for assistance. Pritchard did not recall the Respondent mentioning that this was a "confrontation situation."²

Pritchard approached the driver side of the vehicle, toward the rear and behind the Respondent, and observed him and Faltine³ "going back and forth." The Respondent was asking Faltine to give him her identification, and she apparently was refusing to give it to him. The Respondent asked for her ID three to five times, and then requested that Faltine get out of the car. She refused to do this as well, saying, in sum and substance, "I am not giving you my ID. I don't have to give it to you." That exchange happened "a number of times." Pritchard asserted that the Respondent was "[v]ery calm, collected. He has that demeanor about him always, pretty much." He was not speaking very loudly.

Pritchard did not remember Faltine using profanity, but she was very "verbal" and "controversial," and was arguing a lot with the Respondent. The other occupants of the car were "pretty quiet," but at one point one of them said, "[J]ust show him the ID, try to move it along."

Pritchard testified that the Respondent said, "Well, now you got to get out of the car. You are going to be placed under arrest. If you don't get out of the vehicle, you will

² This term apparently was a reference to *Patrol Guide* § 212-33.

³ Counsel for the Respondent conceded that Faltine was the person Pritchard referred to as the "defendant."

be maced.” Faltine replied, “I am not getting out of the car for you.” Pritchard asserted that the Respondent repeated this to Faltine.

Pritchard testified that the Respondent asked him for pepper spray, as he did not have any of his own. Pritchard gave him his pepper spray, and the Respondent “maced”⁴ Faltine. They “moved up on the car” and arrested her. The Respondent’s use of the mace was “real quick” and not “exaggerated;” he used only one or two spurts of the device. The officers reached into the car, and Pritchard unbuckled Faltine’s seat belt. Pritchard grabbed Faltine’s arm and removed her from the car. The officers arrested and handcuffed her, and placed her in their RMP. Faltine’s car was moved “to a Department spot,” by Pritchard, he believed, and they returned to the Precinct. Pritchard testified that Faltine was compliant after being maced. It was approximately five minutes from the time the officers pulled up behind Faltine until she was removed from the vehicle. It was about one minute from the time Pritchard approached the car until the Respondent used the pepper spray. Pritchard denied hearing Faltine say that she had asthma.

Pritchard testified that when he arrived at the Midtown South Precinct, the Respondent was working as a Sergeant there, and remained there for about one more year. Pritchard conceded that he had a friendly relationship with the Respondent. They did not speak often on the telephone, but would see each other at Police Headquarters because that is where the Respondent worked at the time of trial. Pritchard admitted that he looked at the Respondent’s CCRB testimony while waiting outside the trial room on the day of trial. Pritchard denied discussing the CCRB testimony with the Respondent.

⁴ Department members are issued Oleoresin Capsicum pepper spray, which is technically a different chemical device than mace.

Pritchard stated that a radio call of "[o]fficer needs assistance," or a 10-85, means that any available unit in the area will respond, and that "it is a very serious situation." He did not feel the instant incident was cause for a 10-85.

The Respondent

The Respondent had been working for the Department for almost 17 years, and had been a Sergeant for six or seven years. He had been involved in "[m]ore than one" but "less than 5,000" car stops. He had been trained to take car stops seriously and to see them as dangerous because of "the occupant, the vehicle can drive off, multiple occupants. You don't know what people have inside their car." The Respondent stated that he was 6'1" in height and weighed between 240 and 270 pounds.

On January 15, 2006, the Respondent testified that he was assigned as the Impact supervisor in the Midtown South Precinct, and chose Police Officer Pritchard, a rookie at the time, as his Operator. A second officer was in the back seat. They were driving south on Fifth Avenue and observed a small blue vehicle blocking vehicular traffic. The car was at the crosswalk and intersection of Fifth Avenue and 39th Street, angled toward 39th Street. The Respondent testified that the far right lane of Fifth Avenue was the bus lane, and the far left lane was the parking lane. 39th Street was a one-way street in the westbound direction. Both the Respondent's vehicle and the other car were still on Fifth Avenue.

When the light changed, the Respondent testified, the blue vehicle did not proceed. The Respondent sounded the siren, and "[o]ut of the window came a silver metallic object," apparently a shield, "encased in a black case." The Respondent sounded the siren again, with the same result. Pritchard said, in sum and substance, that it was a

badge or looked like a shield. The Respondent assumed that it was a shield; it appeared to be "a silver object encased in some type of leather thing out of the driver's side window." He told Pritchard something like, "I got it," and told him to remain in the car. The Respondent got out of the car and walked up.

The Respondent anticipated that it might be a "confrontation situation" with an off-duty member of the Department. He did not, however, feel that he needed the assistance of a Police Officer at that time. Had it been "a different sort of car stop," it would be customary for the Operator and not the Respondent to approach.

When the Respondent got to the driver side window, he said to Faltine, who was in the driver's seat and wearing her seat belt, that the block was closed, and she would have to move her car or "go around." The street lighting was no different than any other street in Manhattan. There was a female in the front passenger side, and a male and a female in the back.

Faltine told the Respondent that she needed to make a right turn in order to drop off her friends. The Respondent testified that he repeated to Faltine that the block was closed and she would have to go around. The Respondent asserted that he told Faltine this three to five times. The Respondent denied that Faltine showed him her shield and identification.

The Respondent stated that the club in question was Club Speed, also possibly known as The Shelter. He believed that the club held around 2,000 patrons. The Respondent explained that the procedure in Midtown South was to barricade the street to allow pedestrians to walk around, to block off traffic, and to allow the Mounted Unit to bring in horses. On that night, the Respondent indicated, there was a rap or hip hop artist performing at the club, so at the direction of his superiors, he barricaded the street.

The Respondent conceded that he had discretion to allow someone to pass through a barricade erected for certain precinct conditions, and might allow an ambulance, the Mounted Unit or another police car to pass, but “not for anybody doing business on the block, though.” At a crime scene, however, the Respondent would not allow anyone through.

The Respondent asserted, however, that after between two and four times of telling Faltine that the street was closed, she identified herself as a Correction Officer and said, “How about some professional courtesy?” The Respondent stated that he asked Faltine if she was an officer, and she replied affirmatively. The Respondent testified that he told Faltine that she would “have to produce an ID card.” Faltine held the ID card in her right hand, which was the furthest from the Respondent, and said, “See? I am an officer.”

The Respondent stated that he saw Faltine’s request as one for “preferential treatment.” He also stated that he told Faltine he was not going to grant the professional courtesy. The Respondent conceded that he had requested professional courtesy himself as a member of the NYPD, and had handed over his identification card when requested. He testified that when he had been stopped by law enforcement, “in my obligation of informing them of my status with the New York City Police Department,” he provided his ID card along with his license and registration, and told them he was a police officer.

The Respondent contended that he was unable to see Faltine’s ID, that he told Faltine this, and that he told her she had to remove the ID from its holder. She had not, the Respondent asserted, produced it to the extent he “believed she was not someone impersonating a police officer.” He testified that he did not necessarily need to hold the ID, “although it would have been prudent, because I wouldn’t be able to tell inside of a

casing whether it was a plastic card, whether it was a fake card.” The Respondent noted that NYPD identification cards have a hologram on the back to verify authenticity. Still, the Respondent testified, Faltine could have held her card out of the window just as she did when he first approached the vehicle. The Respondent stated that if he had been able to see Faltine’s photograph and name on the ID card “to see it was her, she would have been told to move the vehicle, and we would have been on our way.” He claimed that he told Faltine that as soon as he believed she was a police officer, “we can move on.”

The Respondent recalled, however, testifying before the CCRB that he ordered Faltine to show or “hand over” her identification card. It was possible, the Respondent testified, that he told Faltine she needed to “present” her identification card.

The Respondent claimed that Faltine told him, in sum and substance, “I don’t have to take it out. You don’t have to see it. I showed it to you.” The Respondent added that Faltine told him that she would “show” him her ID, but would not “give” it to him. The Respondent admitted that Faltine offered to produce her driver’s license. He disagreed that he was frustrated by Faltine’s refusal to hand over the card, or that he was “running out of patience with repeating the same question and getting the same answers.”

The Respondent testified that he then “went through the confrontation situation.” He asked Faltine if she understood who he was, and she said, “Yeah, you are a sergeant. So what?” The Respondent testified that he confirmed that he was a Sergeant, and told Faltine that he did not believe she was a police officer. The Respondent told Faltine that she knew it was her responsibility to prove to him that she was a police officer, so she had to take her ID card out. The Respondent stated that Faltine refused.

At that point, the Respondent testified, he thought she was being belligerent, but by the third or fourth time, he believed she might have been “acting like she was a police

officer and didn't want to show it to me." The Respondent had dealt with criminal impersonation cases in the past, but "[n]ot necessarily of a police officer.

The Respondent testified that he did not believe she was a law enforcement officer, and believed she was impersonating a police officer because she refused to "provide" the ID card. However, the Respondent asserted, he did not believe Faltine was a correction officer because he "was not satisfied with seeing the identification and not visually seeing her face on it that says she is a Corrections Officer."

The Respondent agreed that he had been in confrontation situations before, while on duty, with off-duty members of the NYPD and other departments. The procedures involved with such scenarios are delineated in the Patrol Guide. The Respondent believed that the correct procedure was, if any member was dissatisfied with the outcome between a plainclothes and uniformed police officer, the duty captain was to be called, "and everybody goes back to the house." The uniformed member was to be in charge, the Respondent contended, and "[y]ou have to be compliant." This situation, however, did not involve a plainclothes police officer, the Respondent asserted.

The Respondent testified that he decided the situation was escalating after his numerous requests to see Faltine's ID. The Respondent believed he made eye contact with the officer to whom Pritchard was speaking, and motioned for that other officer, Mischo, to come over. The Respondent believed Mischo saw this signal and turned to Pritchard.⁵ Both of them, the Respondent stated, got out of the vehicle and approached Faltine's car. Pritchard was the first to arrive. The Respondent testified that he called Pritchard over once Faltine "completely refused" to provide her ID. It was a white or

⁵ The Respondent first testified that he did not believe he never mentioned Mischo to the CCRB, but then stated that he did not recall whether he had. Defense counsel stipulated that Mischo was not mentioned during the Respondent's CCRB testimony.

silver shield that had emerged from the window, and the Respondent did not want “a white shield talking to a white shield,” so the Respondent did not need Pritchard when he was first speaking to Faltine.

When Pritchard arrived, the Respondent told Faltine that she had to show her ID to him, and move her car. The Respondent asserted that Faltine refused to move her car, wanted professional courtesy, and stated that she already showed him her ID once and did not have to do it again.

The Respondent testified that he opened Faltine’s car door, and she remained inside. He told her to get out, which she refused to do. At this point, the Respondent stated, he still did not believe Faltine was a police or correction officer, and that “[s]he was going to get arrested one way or the other. She was either going to get a summons for obstructing vehicular traffic in the intersection or collared for impersonating a police officer.” The Respondent claimed that Faltine’s refusals constituted a violation of law, including disorderly conduct, “refusing to comply,” obstructing governmental administration, and the fact that “I am trying to conduct an investigation.”

The obstruction charge, the Respondent testified, was based on the fact that Faltine identified herself as a correction officer, but refused to present her ID card “to my satisfaction” so that he “would believe she was” a correction officer. Had Faltine gotten out of the car at that point and produced her ID card, she would have received a summons for obstructing traffic.

The Respondent characterized Faltine as “a little bit annoyed,” to the extent that one of her passengers said, “‘Why don’t you just show him the ID,’” to which she responded, in sum and substance, that she knew what she was doing. The Respondent testified that he told Faltine once or twice, but possibly three times, to get out of the

vehicle. He testified that by the third time he asked Faltine to step out of the car, "it was time to take action." The Respondent asked either Pritchard or Mischo for pepper spray because his own was broken. The Respondent contended that after receiving Pritchard's pepper spray, he believed he gave Faltine a warning, telling her that if she did not get out of the car, she would be pepper-sprayed. The Respondent contended that Faltine said that if the Respondent pepper-sprayed her, he was going to be in trouble.

The Respondent testified that Faltine did not remove her seat belt. The Respondent claimed that he was unable to see Faltine's hands at that point, but asserted that they were moving around inside the car, but he didn't "know what for." He did not "go into the vehicle and just remove her" because he did not want to "stick my face inside her car with three other people and somebody who is refusing to comply with such a simple order," commenting that he had "enough scars on my face." The Respondent contended that he felt threatened by Faltine because he had "somebody in the car who is refusing to identify themselves, states they are a law enforcement officer. There are three other people in the car inside who I don't know. She is refusing to comply with the simplest of orders." That, the Respondent testified, is why he called Pritchard over; he "felt that this situation was open to anything."

The Respondent stated that he was familiar with *Patrol Guide* § 212-95, which concerns the proper use of pepper spray. He did not believe it prohibited the use of pepper spray within a small vehicle, but agreed the Guide said it should be avoided. The Respondent agreed that the Patrol Guide indicated that pepper spray should not be used absent physical resistance. In the Respondent's view, Faltine was not "physically compliant," which "to me" equaled physical resistance, because "it takes physical movement to actually get out of the vehicle."

The Respondent testified that after he pepper-sprayed Faltine, he believed he reached into the car, "grabbed the seat belt," and removed her from the car. The Respondent believed it was him, not Pritchard, that released the seat belt. Faltine was placed onto the ground, and Pritchard handcuffed her. The Respondent stated that he used "[j]ust one quick shot" of the spray, lasting about one second, and none of the other occupants of the car were affected by it. He characterized Faltine as compliant after being maced, but stated that she did resist slightly when getting out of the car. The Respondent testified that he was comfortable reaching his head into the car at that point because she was immobilized and could not see him move. The Respondent stated that he would rather have had the three passengers remain inside the car than stand outside, but admitted that he was concerned about them.

The Respondent testified that he had never encountered Faltine at Manhattan Central Booking. He testified that the entire encounter, from the sounding of the siren to the arrest, was "probably about ten minutes." However, it was "probably about three to five minutes" between the time he approached Faltine until the time he pepper-sprayed her. That conversation went on for "too long."

On cross-examination, the Respondent conceded that Faltine identified herself as a Correction Officer after requesting professional courtesy. He also conceded that Faltine did not make a threatening movement while she was seated in her car, but asserted that she was non-compliant, which he perceived as threatening. The Respondent admitted that he did not transmit a call for assistance over the radio.

The Respondent stated that after removing Faltine from the car, she was moved to the RMP to be transported to the precinct. The Respondent testified that he spoke with Faltine at the command when she said she wanted to go to the hospital because of

asthma, “or something to that effect.” He denied that Faltine warned him that she had asthma before he pepper-sprayed her. The Respondent testified that the three passengers came to the precinct and took custody of “the property.”

The Respondent contended that when he first pulled behind Faltine’s car, at that point, he simply wanted the car to proceed so he could get by. He was not concerned at that time about possible traffic violations, but rather, his “job was to drop off the other officer, because I had one officer standing in front of a club by himself with a thousand, maybe 2,000 people inside of it.” The Respondent testified that he would not have pepper-sprayed Faltine had she moved her car, handed over her Correction Department ID, or gotten out of her car when he requested.

The Respondent admitted that he had seen the transcript of his CCRB testimony before testifying, and Pritchard had looked at it as well.

FINDINGS AND ANALYSIS

The Respondent is charged with using excessive force against a Correction Officer, Desiree Faltine, while effecting her arrest. Many of the facts are not in dispute. Both sides agree that Faltine wanted to drive down a block that had been barricaded to traffic, and that the Respondent refused to allow her to do so. Both sides also agree that Faltine made at least some display of her Correction Department shield and identification card, and asked to pass as a matter of what the Department Advocate and Faltine termed “professional courtesy.” Both sides further agree that Faltine was not let through, and that the interaction between the Respondent and Faltine culminated in him pepper-spraying her before removing her from her car. The question, therefore, is whether the Respondent engaged in an excessive use of force when he pepper-sprayed Faltine.

I find that his use of force was not excessive, and accordingly find him Not Guilty.

First, to the extent the parties disagree about the material facts, I generally credit the Respondent and do not credit Faltine. I found the Respondent to be a stern and forceful officer, but straightforward and truthful about the facts. Also, his testimony was corroborated in many material respects by his partner, Police Officer Pritchard. On the other hand, I found Faltine to be less than truthful. The fact that Faltine believed that she should be given "professional courtesy" on account of her status as a Correction Officer, and allowed to drive down a street that had been barricaded for nightclub security purposes pursuant to procedure in Midtown South, to drop off passengers who easily could have walked, notwithstanding the cold temperature, damages her credibility. Moreover, several parts of her testimony were dubious, such as her statements that she was "very friendly" in tone toward the Respondent, and that the hospital refused to treat her head injuries. In sum, I found Faltine to be the kind of individual described by the Respondent – one who became unreasonable after her request for a benefit was rebuffed.

I credit the Respondent's testimony that he was not sure whether Faltine was actually a law enforcement officer or that her credentials were legitimate. Faltine testified that she was holding her Correction Department shield and ID in her left hand, and the Respondent testified it was her right hand. Either way, the case must have been toward the interior of the car at some point. Faltine testified that she kept her driver's license in the same holder as that of her shield and ID. She also stated that she was going to hand her driver's license to the Respondent: "*As I turned around to get my driver's license out of my ID card holder, he pepper sprayed me.*" Faltine was seated in the driver's seat of her vehicle, and the Respondent was standing outside her window, to her left. If Faltine was speaking to the Respondent, and had to turn around to get her driver's

license, she had to turn to her right – the middle of the vehicle. If her license was in the middle of the car, her shield and ID, all located in the same container, were there too.

Thus, while it is undisputed that Faltine held these items outside the vehicle's window at the beginning of her encounter with the Respondent, I find that the case containing these items was inside the car when the Respondent was actually trying to verify her identity.

In any event, I viewed Faltine's shield and identification card at trial, and I would not necessarily have been able to discern the legitimacy of those items if they were held out of a car window, particularly at night.

I also find that it was reasonable for the Respondent to be suspicious of Faltine's refusal to display her ID in a manner in which he was able to view it adequately.

Faltine's explanation – that there is such animosity between the Police and Correction Departments that police officers sometimes steal the credentials of Correction officers and that she received "training" not to turn over her ID – does not change the fact that the Respondent would have been nonplussed at her behavior. Moreover, it would have been reasonable for the Respondent to be suspicious of Faltine repeatedly insisting that she be allowed, due to her claimed status as a Correction Officer, to drive down a barricaded street just so she could drop off her friend – who easily could have walked notwithstanding the cold weather.

Furthermore, the Respondent stated that he saw the incident as a "confrontation situation." This refers to *Patrol Guide* § 212-33, which sets forth parameters to safely resolve confrontations between a uniformed member of the service, and a generally civilian-clothed member, on- or off-duty, whose identity and purpose is unclear to the uniformed member (see *Patrol Guide* § 212-33, Purpose, Definitions). The Respondent testified that he originally thought Faltine might have been a member of the New York

City Police Department – a valid deduction, since Faltine’s shield looked like that of a Police Officer. Even after Faltine mentioned she was a Correction Officer, the Respondent apparently operated under his understanding of the Confrontation Situation procedure. This procedure required Faltine to obey all of the Respondent’s commands and to “[p]roduce” her identification for inspection by the Respondent, since the procedure required him to “[e]xamine” the identification for validity and to ensure it matched Faltine (see Patrol Guide § 212-33, Procedure: Confronted Officer, Challenging Officer). The fact that Faltine refused to comply with what was, in truth, a very simple request, would have legitimately raised the Respondent’s impression that Faltine might be impersonating a law enforcement officer.

I further find that the Respondent was justified in requiring Faltine to step out of her car. He testified that, at that point, he intended to possibly arrest Faltine for obstructing governmental administration, or, if she complied and produced her ID card, to give her a summons for obstructing traffic. An arrest for obstructing governmental administration would have been valid. Penal Law § 195.05, Obstructing Governmental Administration in the Second Degree (simple obstruction), states that a person is guilty of the offense when she intentionally obstructs a governmental function by, inter alia, physical interference. The governmental act itself must be authorized. See People v. Lupinacci, 191 A.D.2d 589 (2d Dept. 1993). The Respondent was performing a legally authorized act when he repeatedly sought to verify that Faltine was not impersonating a law enforcement officer by using a Correction Department ID card that was fake or did not belong to her. Furthermore, Faltine’s repeated refusal to give him that ID card constituted physical interference, since physical interference can consist of passive resistance. See, e.g., People v. Williams, 25 N.Y.2d 86, 87-88 (1969) (sit-in protestors’

refusal to leave and going limp when officers tried to remove them constituted “willful resistance” under old Penal Law predecessor to current obstructing governmental administration charge); People v. Stumpp, 129 Misc. 2d 703, 704 (Dist. Ct., Suffolk County 1985) (tavern owner’s refusal to make records available to officers during Alcoholic Beverage Control Law inspection constituted physical interference), aff’d, 132 Misc. 2d 3 (App. Term, 2d Dept. 1986).

Since the Respondent was authorized to make an arrest, he obviously was authorized to remove Faltine from the vehicle, by force if necessary.⁶ The remaining question is whether pepper spray was an appropriate use of force.

Upon cross-examination of the Respondent and closing argument, the Department maintained that *Patrol Guide* § 212-95, which governs the use of pepper spray, demonstrates that the Respondent adopted unreasonable physical force against Faltine. The Respondent was not charged with violating this section of the Patrol Guide, so a technical violation thereof should not result in a penalty. Nevertheless, a review of the section may be instructive. It states that pepper spray may be used to effect an arrest of a resisting suspect, see Patrol Guide § 212-95: Scope; Procedure, [1][a]). It also states that pepper spray may reduce the possibility of injury to both suspects and members of the service “that may result from physical restraint and it should be regarded as a possible alternative to such force and restraint, where practical” (see *Patrol Guide* § 212-95: Scope [emphasis in original]). The section, however, directs members of the Department, “Do not use pepper spray on subjects who passively resist (e.g., going limp, offering no active physical resistance). If possible, avoid using pepper spray on . . . persons with

⁶ While it is not in evidence, I note that the referring memorandum from the CCRB states that the panel exonerated the Respondent on the allegation that he “used physical force” against Faltine (see CCRB referring mem., July 8, 2006, para. III [A]).

known respiratory conditions. . . . In addition, avoid using O.C. spray in small contained areas such as automobiles and closets” (see Patrol Guide § 212-95: Note No. 1 [emphasis in original]).

Here, the Respondent’s safety considerations trumped any countervailing concerns. I credit the Respondent’s decision not to stick his head and body into the car to first unbuckle Faltine’s seat belt, and then to remove her from the car. As the Respondent testified, this would have exposed the Respondent to harm from Faltine, whom he believed at that point might have been impersonating a law enforcement officer. She was also acting contentiously and combatively by refusing to comply with what for a law enforcement officer should have been a simple request. Approaching Faltine from the other side of the car would have involved removing the front passenger, which would have prolonged the encounter and still would required one of the officers to place himself in close quarters with an unknown threat. As noted by the Patrol Guide, a brute-force extraction of Faltine potentially would have exposed both her and the Respondent to more harm than caused by the pepper spray. Thus, it was a proper tactical decision on the Respondent’s part to incapacitate her first, and the way to do that with the least use of force was pepper spray.

Furthermore, crediting arguendo Faltine’s claim that she told the Respondent she had asthma in an effort not to be pepper-sprayed, and noting that the Respondent’s use of the spray was inside an automobile, the Patrol Guide states that such use is to be avoided; it is not prohibited. In fact the Guide states that persons with medical conditions should not be pepper-sprayed “if possible.” Additionally, the car door was open, making it less of an enclosed area, and Faltine admitted she was lying about having asthma in an attempt not to get pepper-sprayed (she actually had [REDACTED]). The point is that here,

the circumstances were such that the Respondent's use of pepper spray against Faltine was a reasonable exercise of force.

In addition, the fact that Faltine was implicitly if not explicitly warned that she would be pepper-sprayed if she did not comply bolsters the conclusion that the Respondent used the pepper spray as a last resort to remove Faltine from the vehicle. The Respondent stated that he specifically told Faltine she would be sprayed if she did not get out of the car. Faltine, however, denied this. Nonetheless, Faltine testified that she heard the Respondent ask someone for pepper spray, and that she told him she had asthma in an effort not to be pepper-sprayed. Thus, even if the Respondent did not explicitly warn Faltine, she was on notice that she would be sprayed if she did not comply with the Respondent's demand to step out of her vehicle.

Finally, I do not believe the instant situation is what the Patrol Guide contemplates by "passively resist." There is a difference between what occurred here and, for example, a protestor who lies down on the sidewalk and refuses to get up, or even a protestor who handcuffs herself to a fence. In the latter scenarios, there is difficulty, but no physical danger, to a member of the service who attempts an arrest. Under the specific circumstances present here though, Faltine's resistance placed the Respondent in danger because her actions required him to expose his head, body, and weapon to a possibly armed suspect in order to make the arrest. In other words, the danger posed by Faltine's so-called "passive resistance" exposed the Respondent to physical harm to the extent that he was entitled to subdue that potential harm by the quick use of pepper spray. See, e.g., Disciplinary Case No. 81003/05 (Respondent found Not Guilty for threatening to pepper spray complaining witness who "bumped chests" with an officer, threatened to harm others, and refused to remove hand from chainlink fence when

officers attempted arrest; facts suggested that complainant, not Respondent, escalated the situation).

In sum, because the Department failed to prove its case by a preponderance of the credible evidence, I find the Respondent Not Guilty.

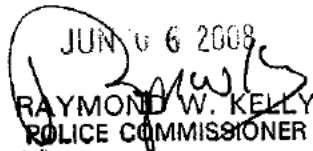
Respectfully submitted,



David S. Weisel

Assistant Deputy Commissioner – Trials

APPROVED



JUN 6 2008
RAYMOND W. KELLY
POLICE COMMISSIONER